No. 84-233

In the Supreme Court of the United States

October Term, 1984

PHILLIPS PETROLEUM COMPANY,
Petitioner,

vs.

IRL SHUTTS and ROBERT ANDERSON and BETTY ANDERSON, Individually and as representatives of all royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds or royalties pursuant to Federal Power Commission Opinion Nos. 699, 699H, 749, 749C, 770 and 770A,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Can Phillips Petroleum Company, the defendant in a plaintiff class action, assert due process rights of nonresident plaintiff class members?

2. Can a state court having *in personam* jurisdiction over Phillips include nonresident plaintiffs in a class consisting of all of Phillips' gas royalty owners?

3. Can a state court allow interest to all plaintiff class members after giving them first class mail notice, the same as FERC interest rates, even though such rates are different than some of the legal rates in other states where Phillips produces gas?

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The opinion of the District Court of Seward County, Kansas, is included in the Petition, A-48 to A-59. The opinion of the Supreme Court of Kansas, written by Schroeder, Chief Justice, was filed March 24, 1984, and appears in the Appendix to the Petition, A-2 to A-47.

NATURE OF THE CASE

The following is quoted from the Kansas Supreme Court opinion, Page A-7:

> "This is a class action suit brought against Phillips Petroleum Company (Phillips) by Irl Shutts, Robert Anderson and Betty Anderson, individually and on behalf of 28,100 royalty owners, including those who are not residents of Kansas, for recovery of interest on 'suspense royalty' on gas produced from leases in eleven states. These royalties were withheld by Phillips at various times from July, 1974 to February, 1978, under three Federal Power Commission (FPC) opinions pertaining to gas rates in *nationwide gas rate proceedings* (emphasis supplied), and later paid by Phillips to the royalty owners without interest. The trial court determined (1) the class consisted of all royalty owners and overriding royalty owners who received suspense royalties from Phillips, whether or not they were residents of Kansas, (2) Phillips was liable for interest on all royalties and overriding royalties retained by it under the FPC opinions, and (3) the applicable rate of interest owed on the suspense royalty payments" (seven percent (7%) per annum until October 10, 1974, nine percent (9%) per annum thereafter until September 30, 1979, and thereafter at the average prime rate, compounded quarterly, as provided by 18 CFR 154.67.) (Petition A-56).

This case is identical to another plaintiff class action against Phillips, *Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292, cert. denied, 434 U.S. 1068, U.S. rehearing denied, 435 U.S. 961 (*Shutts I*), with the exception that FERC (FPC) made rates nationwide commencing with

Opinion 699 in July, 1974, rather than area wide as previously.

Other almost identical cases are:

Maddox v. Gulf Oil Corp., 222 Kan. 733, 567 P.2d 1326, cert. denied, 434 U.S. 1065, 55 L.Ed.2d 766, 98 S.Ct. 1242;

Sterling v. Superior Oil Co., 222 Kan. 737, 567 P.2d 1325, cert. denied, 434 U.S. 1067, 55 L.Ed.2d 769, 98 S.Ct. 1246;

Nix v. Northern Natural & Mobil, 222 Kan. 739, 567 P.2d 1322, cert. denied, 434 U.S. 1067, 55 L.Ed.2d 769, 98 S.Ct. 1246.

Action was filed in July, 1979, by Irl Shutts, a resident of Kansas, and Robert Anderson and Betty Anderson, residents of Oklahoma. Shutts is the owner of royalty interests under five leases owned by Phillips in Texas and Oklahoma. The Andersons are owners of gas royalty interests under a lease owned by Phillips in Oklahoma.

Payments of gas royalties were suspended in part by Phillips under FERC (FPC) Opinion No. 699 from July, 1974 through July, 1976; under FERC Opinion No. 749 from January, 1976 through February, 1978; and under FERC Opinion No. 770 from August, 1976 through July, 1977. Following final approval of price increases, royalties were paid to the royalties owners in the approximate amounts of $3,700,000.00 under Opinion No. 699; $2,900,000.00 under Opinion No. 749; and $4,700,000.00 under Opinion No. 770.

Phillips withheld and used the suspense royalties during the suspension periods, later paying them out to royalty owners without paying or offering to pay interest on the royalties which had been suspended.

The largest number of leases affected under all three opinions are located in Texas and Oklahoma, where the named plaintiffs, Shutts and Andersons, have their oil and gas leases. There were nine other states where Phillips produced gas, including Kansas. Royalty owners under such leases were domiciled in all 50 states and several foreign countries.

ARGUMENT

1. The Due Process Rights Of Nonresident Members Of Plaintiff Class Cannot Be Properly Asserted By Phillips.

The due process rights of nonresident members of plaintiff class cannot be properly asserted by Phillips.

Even though there have been many class actions in U.S. courts and state courts where nonresident plaintiff class members have been included, Phillips contends that the Kansas court cannot now include nonresident members in the plaintiff class.

In this case, all of the plaintiff class has received first class mail notice and have chosen to stay in the case, subject to the jurisdiction of the Kansas court. They have received judgment for all they sought to recover.

Now, Phillips claims that the nonresidents, 97% of the plaintiff class, should not have been included and Phillips should not be liable to them.

As a general rule, however, "one may not claim standing in this court to vindicate the constitutional rights of some third party." *Singleton v. Wulff,* 428 U.S. 106, 114 (1976), quoting *Barrows v. Jackson,* 346 U.S. 249, 255 (1953). The purpose behind this rule is two-fold:

> "First the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in court litigant is successful or not. Second, third parties themselves usually will be the best proponents of their own rights." (*Singleton v. Wulff,* 428 U.S. at 113-114.)

This brief represents both resident and nonresident class members. The nonresident class members do not want to be excluded. They do not want Phillips arguing "for" them. They want to be left in the case and have the benefits of the judgment that they obtained, the best possible judgment they can obtain.

Speculative claims of future harm ought not to be addressed by this court until such harm occurs. (*Golden v. Zwickler,* 394 U.S. 103 (1969), particularly where such claims are based on issues of constitutional significance.)

(*Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 341, 346-48 (1936).)

This Court has ruled many times on the question of whether a judgment in a plaintiff class action would be binding upon class members who were not residents of the forum state. (See *Hansberry v. Lee,* 311 U.S. 32 (1940); *Sovereign Camp of the Woodmen of the World v. Bolin,* 305 U.S. 66 (1938); *Supreme Tribe of Ben-Hur v. Cauble,* 255 U.S. 356 (1921); *Hartfold Life Insurance Co. v. Barber,* 245 U.S. 146 (1917); *Supreme Council of the Royal Arcanum v. Green,* 237 U.S. 531 (1915); *Hartford Life Insurance Co. v. Ibs,* 237 U.S. 662 (1915).)

Phillips does business in Kansas and has been duly served with process in Kansas. No question is asserted as

to the jurisdiction of the trial court or the Supreme Court over Phillips or the trial court's power to enforce a judgment against Phillips.

Accordingly, both because there is no present deprivation of any right of a plaintiff class member and also because Phillips lacks standing to argue the due process rights of its adversaries, this court should decline to review the constitutional question presented.

2. Procedural Due Process Standards And Adequate Representation Give State Courts Power To Bind All Plaintiff Class Members, Resident And Nonresident, By A Final Judgment.

In *Newberg on Class Actions*, 1980 Supplement, Section 1206, it is said:

"It has long been recognized that a state court judgment in a proper class action will be binding on all class members—including resident and nonresident members alike. Recent Supreme Court decisions restricting access to federal courts for class actions when claims of individual members are under $10,000.00 each (*Snyder v. Harris*, 394 U.S. 332, 89 S.Ct. 1053; and *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511) have caused litigants similarly situated to turn more frequently to state forums to redress their common grievances . . . as will be seen, class actions are inherently representative actions which proceed on behalf of and in the absence of class members similarly situated . . . procedural due process standards governing the power to bind absent class members in a representative action differ significantly from those governing conventional actions."

Shutts I, supra, held that "the residential makeup of the class membership is not controlling. . . . while the essential element necessary to establish jurisdiction over nonresident defendants is some 'minimum contact' between the defendant and the forum state, the element necessary to the exercise of jurisdiction over nonresident plaintiff class members is procedural due process." Citing *Hansberry v. Lee,* 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22, 132 ALR 741.

The Kansas Supreme Court in *Shutts I,* also went on to hold that many courts in other states have reached out to bind nonresident plaintiffs.[1]

The Restatement of the Law of Judgments states:

"Section 26 Representative or Class Actions.

"Where a class action is properly brought by or against members of a class the court has jurisdiction by its judgment to make a determination of issues involved in the action which will be binding as res judicata upon other members of the class, although such members are not personally subject to the jurisdiction of the court."

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 318, 94 L.Ed. 865, 70 S.Ct. 652 (1950) recognized the power of a state court to bind nonresidents having no connection with the forum other than as beneficiaries of a trust.

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1. *Chance v. Superior Court,* 58 Cal. 2d 275, 23 Cal. Rptr. 761, 373 P.2d 849 (1962); *Daar v. Yellow Cab Co.,* 67 Cal. 2d 695, 63 Cal. Rptr. 724, 433 P.2d 732 (1967); *Horst v. Guy,* 211 N.W.2d 723 (N.D. 1973); *4 Wright & Miller Federal Practice & Procedure,* Section 1124 (1969); *Philadelphia Electric Co. v. Anaconda American Brass Co.,* 43 FRD 452; *City of Philadelphia v. Morton Salt Co.,* 248 F.Supp. 506; Professor Moore, *3B Moore's Federal Practice,* Section 23.11(5).

Shutts I has been widely cited by other authorities since handed down in 1977.[2]

In *Keeton v. Hustler Magazine, Inc.*, (1984) 104 S.Ct. 1473, this Court said:

> ". . . we have not to date required a plaintiff have 'minimum contacts' with the forum state before permitting that state to assert personal jurisdiction over a nonresident defendant . . ." (104 S.Ct. at 1480-81.)

As held in this case by the Kansas Supreme Court:

"Where the procedural due process guarantees of notice and adequate representation are present, Kansas courts may exercise jurisdiction over nonresident plaintiffs . . . (Syl. 2, Pet. A-2.)

3. Commonality Of Interests Of Residents And Nonresidents.

Commonality of interests of plaintiff class members, resident or nonresident, is well documented and shown, whether or not "minimum contacts" are present.

There are many affiliating circumstances in this case that show the commonality of interests of the plaintiff class:

1. All of them are gas royalty owners of Phillips whose names and addresses have been furnished by Phillips from its records.

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2. See *Miner v. Gillette Co.*, 87 Ill. 2d 7, 12-13, 428 N.E.2d 478 (1981), cert. dismissed, 459 U.S. 86; *In Re No. Dist. of Cal. "Dalkon Shield" IUD Products*, 526 F.Supp. 887, 906 N. 79 (N.D. Calif. 1981), vacated and remanded, 693 F.2d 847 (1982); *Schlosser v. Allis-Chalmers Corp.*, 86 Wis. 2d 226, 241-42, 271 N.W.2d 879 (1978); *Katz v. NVF Co.*, 119 Misc. 2d 48, 51, 462 N.Y.S.2d 975 (1983). See also *Geller v. Tabas*, 462 A.2d 1078, 1083 (Del. 1983); Restatement (Second) of Judgments 41 (1982); *3B Moore's Federal Practice*, 23.11(5), p. 23-2893 (1983); *Newberg on Class Actions*, 1206 et seq. (1980 Supp.).

2. Notices of suspension were given by Phillips to all of its gas royalty owners under leases in the eleven state area at the same time.

3. Phillips suspended the royalties at the same time as to its gas royalty owners in the eleven states, including Kansas.

4. Phillips accumulated and used all of the royalties at the same time—not just those of Kansas residents. Thus, the "suspense royalties" are analogous to a "common fund".

5. Phillips paid out the suspense royalties at the same time to all of its gas royalty owners—not on a state by state basis.

6. First class mail notice has been given to all present members of the plaintiff class, about 28,000 of them, and they chose to stay in the Kansas action.

7. Phillips kept its records and treated all of its gas royalty owners alike, regardless of residency. The factual and legal issues are the same as to all of them.

8. FPC (FERC) beginning with its Opinion 699 in July, 1974, regulated rates nationwide, not areawide, and all of Phillips' gas royalty owners were thereby affected.

9. Oil and gas production is a significant industry in Kansas. "The State of Kansas has an interest in supervising the conduct of Phillips' business in this state, and therefore affiliating circumstances exist between the forum and the litigation not present in *Feldman v. Bates Manufacturing Co.*, 143 N.J. Super 84, 362 A.2d 1177." (A-26)

This is the only action filed against Phillips in any of the eleven states where it produces natural gas to collect interest on the FPC (FERC) suspense royalties. It has been more than six years since the last payout in 1978, under Opinion 770. Statutes of limitation have run in the other ten states and this is the only chance that plaintiff class and its members, resident and nonresident, will have to collect interest or damages in the form of interest.

If Phillips could eliminate from plaintiff class all nonresidents of Kansas, then it will have accomplished its objective, reducing recovery in the case to a minimal amount, not worth fighting a class action to recover.

4. Common Fund Class Action Cases Are Analogous.

In *Shutts I, supra* the Kansas court held at 222 Kan. 552:

> "Had Phillips put the 'suspense royalty' into a common trust fund, separate from its operating funds, to be used solely to pay either the pipeline companies or the gas royalty owners once the FPC ultimately decided the rate increase question, this case would dove tail nicely into the 'common fund' cases. Instead Phillips commingled the 'suspense royalty' with its other cash and used the 'suspense royalty' to fulfill all its business obligations. In this manner the 'suspense royalty' which never did or could belong to Phillips, enriched Phillips at the expense of the royalty owners. To hold that Phillips' act of using the money for business purposes, and not putting it into a separate corporate account, takes this case out of the 'common fund' category would reward Phillips' action at the expense

> of innocent gas royalty owners." (Citing *Perlman v. First National Bank of Chicago*, 15 Ill. App. 3d 784, 75 N.E.2d 236.)[3]

5. Miner v. Gillette Co., 87 Ill. 2d 7, 428 N.E.2d 478 (1981), cert. granted, 456 U.S. 914, cert. dismissed, 459 U.S. 86 (1982).

Much was said by Phillips in its Petition for Certiorari attempting to obtain a direction that Judge Duckworth, the trial judge in this case, eliminate nonresident plaintiff class members.[4]

Miner was dismissed by this Court by reason of the fact that there was not yet a final judgment subject to review. Since that time, the nationwide class, residents and nonresidents, was certified by the trial judge in *Miner*, and the case was then settled by Gillette giving to all plaintiff class members prizes or items similar to what they sought to recover in their action.

This case has some similarity to *Miner*, but it consists of Phillips' gas royalty owners, a much more cohesive group with common treatment by Phillips and with common interests, as shown in Section 3 of this brief.

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3. See also:

Hartford Life Ins. Co. v. Ibs, 237 U.S. 662, 35 S.Ct. 692, 59 L.Ed. 1165; *Hartford Life Ins. Co. v. Barber*, 245 U.S. 146, 38 S.Ct. 54, 62 L.Ed. 208; *Carpenter v. Pacific Mutual Life Ins. Co.*, 10 Cal. 2d 307, 74 P.2d 761; *Nesbett v. Carpenter*, 305 U.S. 297, 59 S.Ct. 170, 83 L.Ed. 182, reh. denied, 305 U.S. 675, 59 S.Ct. 355, 83 L.Ed. 437; *Larson v. Pacific Mutual Life Ins. Co.*, 373 Ill. 614, 27 N.E.2d 458, cert. denied, 311 U.S. 698, 61 S.Ct. 137, 85 L.Ed. 452; *Royal Arcanum v. Green*, 237 U.S. 531, 35 S.Ct. 724, 59 L.Ed. 1089; *Sam Fox Publishing Co. v. U.S.*, 366 U.S. 683, 81 S.Ct. 1309, 6 L.Ed.2d 604.

4. *Phillips v. Duckworth, Judge, et al.*, 103 S.Ct. 725 (1983).

6. As To Interest Rate, Law Of The Forum Should Be Applied Rather Than Laws Of The Eleven States Where Phillips Produces Gas.

The general rule is that the law of the forum applies unless it is expressly shown that a different law governs, and in case of doubt, the law of the forum is preferred. (16 Am. Jur. 2d, *Conflict of Laws,* Section 5.)

All of the plaintiff class members in this lawsuit were given actual first class mail notice that this action was being brought on their behalf in the State of Kansas. The plaintiffs had the opportunity to opt out of the lawsuit and many of them did, but 28,100 of them chose to have their claims litigated in the Kansas courts. The Kansas courts have held that the plaintiff class members were adequately represented in the lawsuit and that the forum had a significant legitimate interest in adjudicating claims of class members. (*Shutts II.*)

The common fund nature of the lawsuit provides an excellent reason to apply a uniform measure of damages to the class as a whole, as each member of the class has been similarly deprived of the rightful use of his or her money. (*Shutts II.*)

In this case the law of Kansas, the forum, designating FERC interest rates, should apply. (*Gordon v. Foster,* 17 Wall. (U.S.) 123, 21 L.Ed. 589; *Shutts II* opinion, Pet. A-43.)

In *Shutts I, supra,* the Kansas Supreme Court reasoned that:

1. The oil and gas leases were involved in the case incidentally only. (222 Kan. 546.)

2. The Kansas trial court had *in personam* jurisdiction and venue of the case was wherever Phillips could be found doing business. (222 Kan. 547.)

3. Statutory interest rates of Kansas, Texas and Oklahoma were not pertinent to the case since they applied only if there was no agreed interest rate. (222 Kan. 564.)

4. Phillips, by corporate undertaking had agreed to pay interest rates established by FPC on the "suspense royalties" if ordered returned to the gas purchasers. (222 Kan. 560.)

5. Phillips put the "suspense royalties" in its corporate funds and used them to help make substantial profit. (222 Kan. 560.)

6. "Suspense royalties" eventually would go to gas purchasers or to royalty owners and never could belong to Phillips. (222 Kan. 564.)

7. Equity dictates that Phillips, having been enriched by the use of royalty owners' money, should pay royalty owners the FPC agreed rate just as they would have had to repay gas purchasers if ordered to do so. (222 Kan. 561.)

In *Shutts II,* the Kansas court further enlarged on the common fund analogy as a reason for a uniform measure of damages, and to hold Phillips liable for interest at the agreed FPC (FERC) rates. (235 Kan. 221, Pet. A-43.)

The reasoning of the Kansas court is in accord with equitable principles. It does not offend statutory or common law rules of the ten other states where Phillips produces gas. It does not contravene any U. S. constitutional principles. It does not create any federal question for which certiorari should be granted.

The ruling of the Kansas court merely requires Phillips to pay for the use of its royalty owners' money—something it should have done without court action—at least without court action a second time on this same matter.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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